UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§	

LEAD PLAINTIFF THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S RESPONSE TO WOLF HALDENSTEIN'S ADDITIONAL MEMORANDUM

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I. INTRODUCTION

The law firm of Wolf Haldenstein Adler Freeman & Herz LLP has asked this Court to force the Court appointed Lead Plaintiff, The Regents of the University of California (the "Regents"), to graft onto the claims asserted in plaintiffs' Consolidated Complaint the claims of those persons who purchased shares of Enron Capital Trust I and Enron Capital Trust II prior to the Class Period (the "1996-97 Preferred Purchasers").[1] However, if the Court appointed Lead Plaintiff were compelled to append these claims onto the existing action, they would divert attention away from and place at risk the substantially stronger claims currently asserted on behalf of the Class. Defendants will most assuredly argue that the 1996-97 Preferred Purchasers' claims are substantially (if not entirely) time-barred, and were so even prior to the consolidation of these proceedings. Thus, if forced to prosecute the 1996-97 Preferred Purchasers' claims, defendants will likely embroil the Lead Plaintiff in a major diversion of time and effort in disputing defendants' contention that the five year statute of repose under the Texas Securities Act expired on November 18, 2001 and January 13, 2002 respectively, and that the Preferred Purchasers' claims had to be filed as of those dates. They were not.

While Lead Plaintiff would be able to assert that at least one complaint was timely filed before the statute of repose on behalf of certain purchasers of the Preferred Stock, Lead Plaintiff could not argue in good faith that this complaint was adequate to enable the Lead Plaintiff to alter the Consolidated Complaint to include the claims of the 1996-97 Preferred Purchasers. The Court appointed Lead Plaintiff and Lead Counsel do not believe that it is appropriate to subject the Class to the burden and the risk of claims that would alter the structure of the Class as well as require the assertion of new claims against defendants who were not named previously or were not named within five years of the sale of the Preferred Stock.

The limited pecuniary value of any such claims combined with the legal and factual issues detailed herein, militates in favor of not appending the claims of the 1996-97 Preferred Purchasers to the Consolidated Complaint. The Preferred Purchasers' claims, which their counsel seek to

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[1]The federal Class Period as defined in the Consolidated Complaint is October 19, 1998 to November 27, 2001. Persons who purchased shares of Enron Capital Trust I and Enron Capital Trust II (collectively the "Preferred Stock") during the Class Period are already members of the putative Class. *See* Consolidated Complaint, ¶1.

append to the Consolidated Complaint, should not be allowed to impede the efficient litigation of this massive and highly complex matter. Rather, Lead Plaintiff and Lead Counsel believe that it would be more appropriate for the Preferred Purchasers and their own counsel to prosecute the claims of those persons who the purchased the Preferred Stock prior to October 18, 1998.

II. PROCEDURAL HISTORY

On February 15, 2002, the Regents was appointed Lead Plaintiff. On April 8, 2002, the Regents filed its Consolidated Complaint for Violations of the Securities Laws. The Consolidated Complaint includes claims under the federal securities laws on behalf of all persons who purchased Enron Corporation's publicly traded equity and debt securities between October 19, 1998 and November 27, 2001, including the Preferred Stock. This is the maximum three-year period provided for under the Securities Act of 1933 and the Securities Exchange Act of 1934. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362-63 (1991) (holding that "the 3-year limitation is clearly ... a cutoff," as "the 1-and-3-year structure in the broad range of express securities actions contained in the 1933 and 1934 Acts suggests a congressional determination that a 3-year period is sufficient"). Thus, the Consolidated Complaint asserts claims for all purchasers of the Preferred Stock beginning on the date three years prior to the commencement of the first-filed securities class action (October 19, 1998) through November 27, 2001. The 499-page Consolidated Complaint was filed on April 18, 2002.

On May 3, 2002, the law firm of Wolf Haldenstein Adler Freeman & Herz LLP filed on behalf of Henry H. Steiner, Daniel Kaminer, Christine Benoit, Michael and Jennifer Cerone, and Harold Karnes (collectively and with all other persons who purchased Enron preferred stock between November 18, 1996 and October 18, 1998 (the "1996-97 Preferred Purchasers"), its Additional Memorandum of Law, Submitted in Light of the Consolidated Complaint Filed by the California Regents, in Further Support of the Preferred Purchaser Plaintiffs' Motions For Clarification (With Expedition) of this Court's Memorandum and Order Dated February 15, 2002 (the "Additional Memorandum").

The Additional Memorandum seeks to have the Court direct the Lead Plaintiff and Lead Counsel to append to the Consolidated Complaint and to prosecute with Wolf Haldenstein claims

under Texas law, including negligent misrepresentation claims and claims under the Texas Securities Act ("TSA") on behalf of: (1) the class of purchasers of shares of stock who purchased their shares between November 18, 1996 (the date of the initial public offering of Enron Capital Trust I shares) and March 30, 1998; and (2) the class of purchasers of shares of Enron Capital Trust II preferred stock who acquired their shares between January 13, 1997 (the date of the initial public offering of Enron Capital Trust II) and October 18, 1998. Wolf Haldenstein seeks to have itself appointed as representative counsel for the 1996-97 Preferred Purchasers in this action. On June 14, 2002, this Court ordered Lead Counsel to confer with Wolf Haldenstein to determine if a supplement to the Consolidated Complaint should be filed and, if Lead Counsel did not agree to do so, to file this response within 20 days.

Pursuant to this Court's June 14 Order, Lead Counsel has repeatedly discussed the claims of the 1996-97 Preferred Purchasers with Wolf Haldenstein. Lead Counsel asked Wolf Haldenstein to provide a draft of the claims that Wolf Haldenstein believed should be appended to the Consolidated Complaint to define the contours of the new class that Wolf Haldenstein believed should be added to the Consolidated Complaint. On June 20, 2002, Wolf Haldenstein provided the initial draft of the supplement that it stated should be appended to the Consolidated Complaint, ***which draft asserted in ¶¶103, 128, 144, 161 & 188, claims for damages under the TSA and for negligent misrepresentation under Texas common law.*** After reviewing the initial draft, Lead Counsel asked the obvious question of Wolf Haldenstein: why claims for damages under Texas state law for the 1996-97 Preferred Purchasers which Wolf Haldenstein wanted to force the Lead Plaintiff to append to the Consolidated Complaint and then prosecute, were not preempted by the Securities Litigation Uniform Standards Act ("SLUSA")?[2] Only after Lead Counsel pointed out that the proposed claims for damages based upon Texas statutory or common law were expressly preempted

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[2] *Compare Wald v. C.M. Life Ins. Co.*, No. 3:00-CV-2520-H, 2001 U.S. Dist. LEXIS 2593, at *16 (N.D. Tex. Mar. 8, 2001) (holding that only actions for "monetary damages" are "covered class action[s]" under SLUSA) *with* Supplement to the Consolidated Complaint for Violation of the Securities Laws, Asserting Additional Facts and Claims on Behalf of Enron Preferred Stock Purchasers (Draft Version Dated June 20, 2002) ¶¶103, 128, and Prayer for Relief (seeking damages on behalf of 1996-97 Preferred Purchasers under the TSA against defendants for making false and misleading statements in the offering documents for these securities).

by SLUSA, did Wolf Haldenstein then alter its suggested supplement to provide only for rescission claims? Apparently, notwithstanding its original attempt to add (and force Lead Plaintiff to prosecute) damage claims, now Wolf Haldenstein seeks to limit the claims it wishes to force the Lead Plaintiff to bring for the 1996-97 Preferred Purchasers to rescission. Accordingly, on June 26, 2002, Wolf Haldenstein provided Lead Counsel with a corrected supplement to the Consolidated Complaint seeking to add to the Consolidated Complaint a claim under the TSA ***for rescission*** for the 1996-97 Preferred Purchaser class. The Lead Plaintiff and Lead Counsel believe that the Consolidated Complaint should not be so supplemented.

III. ARGUMENT

After thorough analysis and consideration, Lead Plaintiff and Lead Counsel have determined that the 1996-97 Preferred Purchasers' claims should not be added to the Consolidated Complaint.

IV. THE CLAIMS OF THE ENRON CAPITAL TRUST I PREFERRED PURCHASERS FACE SUBSTANTIAL HURDLES TO RECOVERY

A. Defendants Will Undoubtedly Attempt to Divert Lead Plaintiff's Time and Effort Away from the Case in Chief by Arguing that the Claims for Purchasers in the Offering Are Time Barred

The statute of repose under the TSA is five years. Tex. Rev. Civ. Stat. Ann. art. 581-33(H)(2)(b). The Enron Capital Trust I offering was conducted on November 18, 1996. Class action complaints filed prior to November 18, 2001 may have preserved the TSA claims of the class of preferred shareholders who purchased in the November 1996 offering had those complaints satisfied certain requirements. However, because the Lead Plaintiff is not aware of any purchaser ***in the offering*** who, on or before November 18, 2001, commenced an action which included a class period extending back to the date of the offering, it is highly likely that defendants may argue that the 1996-97 Preferred Purchasers' claims are time barred with respect to the November 18, 1996 offering.

Rule 15(c) of the Federal Rules of Civil Procedure provides for the relation back of amendments. Because no plaintiff field a complaint with a class period covering the November 18, 1996 offering, the proposed supplement would have to amend the prior complaints in this action to broaden the Class Period. However, extending the Class Period backwards would entail adding new plaintiffs, which requires compliance with Rule 15(c)(3). *See, e.g., Allied Int'l v. International*

Longshoremen's Ass'n, 814 F.2d 32, 35-36 (1st Cir. 1987); *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1278 (9th Cir. 1982); *Staren v. American Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1263 (7th Cir. 1976). In this regard, the Third Circuit has held:

> Statutes of limitations ensure that defendants are "protected against the prejudice of having to defend against stale claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs." *Cunningham*, 530 A.2d at 409 (citations omitted). In order to preserve this protection, ***the relation-back rule requires plaintiffs to show that the already commenced action sufficiently embraces the amended claims so that defendants are not unfairly prejudiced by these late-coming plaintiffs and that plaintiffs have not slept on their rights***.
>
> Where the effort is to add new parties, courts apply subparagraph (3), and inquire whether the defendants (A) received such notice that they will not be prejudiced in maintaining a defense on the merits, and (B) ***knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought with the original claims***.

Nelson v. County of Allegheny, 60 F.3d 1010, 1014 (3d Cir. 1995) (emphasis added). Lead Plaintiff/Lead Counsel are currently unaware of any complaints filed by Wolf Haldenstein or by anyone else before the expiration of the five year statute of repose imposed under the TSA – which would allow the Lead Plaintiff to successfully argue that the defendants had timely been put on notice of the 1996-97 Preferred Purchaser's claims with respect to the 1996 offering. Lead Plaintiff/Lead Counsel are also concerned that the Additional Memorandum claims that the 1996 offering documents were false because they "incorporated by reference the 10-K for 1995 and Enron's three 10-Qs for the first three quarters of 1996, ending September 30, 1996." Additional Memorandum at 4. However, Wolf Haldenstein offers little evidence in the Additional Memorandum or elsewhere to support such claims. Notably, Lead Counsel is not aware of complaints in this action (including those filed by Wolf Haldenstein), which, prior to Wolf Haldenstein's current effort to create a "niche" class, alleged misstatements in connection with the offering documents used to sell the Preferred Stock.

Although Wolf Haldenstein flatly states that there is no statute of limitations issue because "the original complaint by the Preferred Purchaser Plaintiffs was filed on approximately October 30, 2001, less than five years after both preferred stock offerings" (Additional Memorandum at 5 n.3), Lead Counsel is very concerned about how it would be able to successfully counter any argument

by defendants that the complaints filed by Wolf Haldenstein and/or other 1996-97 Preferred Purchasers were untimely. Wolf Haldenstein omits the crucial fact that the referenced complaint, filed by Wolf Haldenstein on behalf of Henry H. Steiner on October 29, 2001, only purports to cover a class period beginning on June 1, 1999 and ending on October 26, 2001. *Steiner* Complaint, ¶1 (attached hereto as Ex. 1). Indeed, even a cursory review of the Original *Steiner* Complaint filed by Wolf Haldenstein shows that its analysis of the defendants' wrongdoing was limited to 1999-2001. Thus, it would be very difficult – to say the least – for Lead Plaintiff/Lead Counsel to counter an argument by defendants that the Original *Steiner* Complaint failed to adequately put defendants on notice for claims against them in connection with the November 18, 1996 offering.

The First Amended *Steiner* Complaint (attached hereto as Ex. 2), fares little better. First and foremost, Wolf Haldenstein did not file it until November 30, 2001 – more than five years after the November 18, 1996 offering. Even assuming that this amendment was found to be timely, notwithstanding the fact that it was filed more than five years after the offering, ***the First Amended Steiner Complaint did not purport to bring a claim on behalf of purchasers in the November 18, 1996 offering***. The scope of the First Amended *Steiner* Complaint is clearly limited to statements made on or after January 21, 1997. *See* First Amended *Steiner* Complaint, ¶¶38-64. Again, like the other complaints that have been consolidated in this action, the First Amended *Steiner* Complaint is focused on the period covered by Enron's restatement – 1997 through 2001. ***Indeed, the class period in the First Amended Steiner Complaint begins on January 21, 1997***. *Id.*, ¶1.[3] Again, read as a whole, it would take an inordinate amount of time and effort to attempt to counter the argument that the First Amended *Steiner* Complaint put any defendant on notice of claims arising from the 1996 offering, as all of the alleged wrongdoing in the First Amended *Steiner* Complaint occurred much later than the period underlying the 1995 financials. Notably, ***the First Amended Steiner***

[3]Additional examples abound. The First Amended *Steiner* Complaint names as defendants Skilling and Fastow – but alleges only that Fastow served as a Senior Vice President and Chief Financial Officer at Enron from March 1998 and that Skilling acted as Enron's President and Chief Operating Officer from January 1997 – and states no facts concerning their liability for actions taken prior. *See* First Amended *Steiner* Complaint, ¶¶4,5. Likewise, Andersen is named as a defendant, but the Complaint alleges only that Andersen opined on Enron's financials starting in 1997 – not the 1995 financial statements incorporated by the Preferred Stock offerings in 1996 and 1997. *Id.*, ¶13.

Complaint did not even assert claims under the TSA at all. *See* First Amended *Steiner* Complaint (bringing claims under federal law for violations of the Securities Exchange Act of 1934 and under state law for negligent misrepresentation). Because it will be difficult for Lead Plaintiff/Lead Counsel to argue that the First Amended *Steiner* Complaint – like the Original *Steiner* Complaint filed by Wolf Haldenstein – put any defendant on notice of the claims arising from the November 18, 1996 offering, it almost ensures that defendants will forcefully argue that the proposed supplement is time-barred unless another complaint put defendants on notice of these claims.

Lead Counsel has reviewed other complaints filed in this action in its effort to ascertain whether it would be appropriate to append the claims proposed by Wolf Haldenstein to the Consolidated Complaint. As part of this review to see if defendants had been on notice of these claims, Lead Counsel reviewed the *Coy* Petition which, like the others reviewed, does not appear to provide a strong basis for arguing that it put the defendants on notice of the 1996-97 Preferred Purchaser Plaintiffs' claims. The *Coy* Petition, filed in the District Court of Harris County, Texas on November 5, 2001, and amended twice thereafter, concerns matters post-dating the November 1996 offering. For example, the original *Coy* Petition explicitly stated that "[f]rom at least January 1, 1999, Andersen has advised and assisted Enron in certain accounting transactions" and that "[t]he facts alleged in this petition occurred since December 1999." Plaintiffs' Original Petition, ¶¶3,12 (Ex. 3 hereto).[4] Thus, it will be extremely difficult for Lead Plaintiff to overcome any arguments that defendants could not have anticipated having to defend their roles in the 1996 offering because of complaints other than the *Steiner* complaints.

Facing the very same issue that Lead Plaintiff would be forced to argue before this Court, in *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922 (9th Cir. 1996), the Ninth Circuit rejected plaintiffs' attempts to amend the class period, holding:

> An amendment adding a party plaintiff relates back to the date of the original pleading only when: 1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is an identity of interests between the original

[4]Subsequent amendments to the petition, filed on or about December 6, 2001 and December 10, 2001, claim that defendants' wrongdoing began in 1997 but again did not address the 1996 offering or address any wrongful act committed prior to 1997. *See* Exs. 4 & 5 hereto.

> and newly proposed plaintiff. Here, Plaintiffs did not show that the two groups of plaintiffs had an identity of interests. ***The claims of the proposed plaintiffs are different because the newly proposed class members bought stock at different values and after different disclosures and statements were made by Defendants and analysts. Therefore, Plaintiffs from the original class period would have different interests than those who bought stock [in the new portion of the proposed class period]. Accordingly, the proposed new claims did not relate back.***

Id. at 935 (emphasis added; citations and footnote omitted). As demonstrated above, the facts before the Ninth Circuit were substantially similar to those here. Lead Plaintiff's allegations in the Consolidated Complaint, almost exclusively, detailed allegations concerning how Enron's 1997-2001 financial statements were false, because of, among other things, Chewco's/JEDI's fraudulent formation and utilization ***at year-end 1997***. *See, e.g.,* Consolidated Complaint, ¶¶9-11. The two Preferred Stock offerings (that are the subject of the original and amended proposed supplement proffered by Wolf Haldenstein), however, did ***not*** incorporate Enron's 1997 financials. Rather, the offering documents incorporated Enron's ***1995 financial statements*** and were completed over a year prior to the release of the fraudulent 1997 financial statements.[5] Lead Plaintiff/Lead Counsel do not believe that claims of the 1996-97 Preferred Purchasers are substantially the same as those of the existing Class members or that the Lead Plaintiff/Lead Counsel should be burdened with diverting its attention and resources to such claims and away from its case in chief.

B. Aftermarket Purchasers Appear to Lack Privity With Any Named Defendant Which Will Subject Them to Severe Attack That They do Not Have Viable Claims Against Any Potential Defendant

According to the most recent draft of the 1996-97 Preferred Purchasers' proposed supplement to the Consolidated Complaint, provided to Lead Counsel on July 2, 2002, Wolf Haldenstein seeks to bring claims under the TSA "on behalf of purchasers of Enron Corporation's ... publicly traded preferred securities between November 18, 1996 and October 18, 1998, inclusive." *See* ¶1. Wolf

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[5]Review of the Additional Memorandum demonstrates that the 1996-97 Preferred Purchasers have not as yet provided Lead Plaintiff with substantial factual support for their claims, and the factual support they do muster indicates that the 1996-97 Preferred Purchasers' claims do not arise from the same factual allegations alleged in the Consolidated Complaint, either of the *Steiner* complaints, or any other complaint filed in these proceedings. *See* Additional Memorandum at 5 n.2 (purporting to detail defendants' fraudulent actions affecting the Preferred Stock offerings). Thus, apart from whether the 1996-97 Preferred Purchaser claims are time barred, the strength of these claims appears to be far less certain than the detailed allegations of fraud asserted on behalf of the Class in the Consolidated Complaint.

Haldenstein puts forth five plaintiffs who purchased their stock after the public offering, and who seek to represent the class of investors who purchased stock in the aftermarket.

Aftermarket purchasers' claims would be difficult for Lead Plaintiff to prosecute because the proposed plaintiffs appear to lack privity with the proposed defendants. Lead Counsel has found only two cases recognizing a cause of action under art. 581-33(A)(2) of the TSA for "***private, secondary securities transactions***." *Anheuser-Busch v. Summit Coffee Co.*, 934 S.W.2d 705, 708 (Tex. App.-Dallas 1996, writ dism'd) (emphasis added); *Texas Capital Sec., Inc. v. Sandefer,* 58 S.W.3d 760, 776 (Tex. App.-Houston 2001). Although art. 581-33(A)(2) allows for actions against sellers, it requires that there be ***privity*** between the purchaser and the seller. *See, e.g.,* Tex. Rev. Civ. Stat. Ann. art. 581-33 cmt. ("[T]his is a privity provision, allowing a buyer to recover from his offeror or seller."). In both *Anheuser-Busch* and *Texas Capital,* the plaintiffs were able to satisfy the requisite element of privity under the TSA between themselves and the seller of the security. In *Texas Capital*, the plaintiffs "dealt directly with [the defendants] and were therefore in privity." 58 S.W.3d at 776. In *Anheuser-Busch Cos. v. Summit Coffee*, the parties entered into a direct transaction, satisfying the element of privity. *See* 858 S.W.2d 928, 931 (Tex. App.-Dallas 1993) (describing the transaction). Because the Preferred Stock was traded on the New York Stock Exchange as Wolf Haldenstein recognizes, the 1996-97 Preferred Purchasers who acquired their holdings in the aftermarket have privity with the person from whom they purchased their stock. Upon review of the draft supplements provided to Lead Counsel, Lead Counsel believes this is likely the market maker for the security on the New York Stock Exchange.[6] Determining from whom each of the 1996-97 Preferred Purchasers purchased, and whether any such person has a valid defense,

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[6]According to Barron's Dictionary of Finance and Investment Terms, to "Make a Market" is to "maintain firm bid and offer prices in a given security by standing ready to buy or sell round lots at publicly quoted prices. The dealer is called a market maker in the over-the-counter market and a specialist on the exchanges. A dealer who makes a market over a long period is said to maintain a market." Thus, in the case of Enron's preferred stock, which traded on the New York stock Exchange, the market maker is a "specialist." According to the New York Stock Exchange Web site, "if buy orders temporarily outpace sell orders in a stock - or if sell orders outpace buy orders - the specialist is required to use his firm's own capital to minimize the imbalance.... In this role the specialist acts as a principal or dealer. Specialists participate in only about 10 percent of all shares traded. The rest of the time, public order meets public order, without specialist participation." http://www.nyse.com/members/members.html.

raises manageability issues not otherwise present which could easily overwhelm this litigation and make class certification difficult at best. Furthermore, to Lead Counsel's knowledge, the NYSE specialists for the Preferred Stock (or any other seller for that matter), have not been named in any action thus far; have not been proffered to Lead Counsel as defendants by Wolf Haldenstein in its supplement to the Consolidated Complaint; made no false representations that Lead Counsel is aware of and has a strong defense that they "did not know, and in the exercise of reasonable care could not have known, of the untruth or omission" alleged by the 1996-97 Preferred Purchasers.[7] Lead Counsel similarly believes it to be highly dubious as to whether a viable claim could be asserted by the 1996-97 Preferred Purchaser plaintiffs against an aftermarket seller simply for selling the Preferred Stock.[8]

V. LIKELY ENRON CAPITAL TRUST II PREFERRED PURCHASER PLAINTIFFS' CLAIMS ARE SUBJECT TO SUBSTANTIAL DEFENSES

A. The Claim Is Likely Limited and Should Not Be Allowed to Divert Lead Counsel's Efforts and Resources

The claims of the Enron Capital Trust II Preferred Purchaser plaintiffs are limited for numerous reasons. ***First***, as demonstrated above, it is highly likely that the class proposed by Wolf Haldenstein will be limited to persons who purchased in the offering and not those who purchased on the aftermarket. ***Second***, as is now recognized by Wolf Haldenstein, to comply with SLUSA, the class is limited to persons who can seek rescission.[9] A "plaintiff ***who still owns the securities*** is entitled to have the transaction rescinded and to recover, ***upon making a tender of the security***." Keith A. Rowley, "*The Sky is Still Blue in Texas: State Law Alternatives to Federal Securities Remedies*," 50 Baylor L. Rev. 99, 159 (1998) (emphasis added). Thus, it is plain that only those

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[7]The quoted language is a statutory defense provided under the TSA for sellers. Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(2). While a claim against the market maker in these securities may not be time barred, Lead Counsel does not believe it appropriate to assert a claim against a defendant where it believes that the good faith defense exists.

[8]The foregoing analysis applies equally to claims brought on behalf of aftermarket purchasers of Enron Capital Trust II Preferred stock.

[9]Indeed, Wolf Haldenstein has persisted in arguing for the prosecution of damages claims preempted by SLUSA, and did not provide Lead Plaintiff/Lead Counsel with a workable draft until June 26, 2002.

persons who purchased in the offerings approximately five years ago and ***still own*** the Preferred Stock presently (as opposed to at the time the litigation commenced) have viable claims. Wolf Haldenstein has not offered Lead Counsel or the Court a single scrap of evidence to confirm which, if any, of its proposed representatives still hold the Preferred Stock which they are required to do given Wolf Haldenstein's recent adjustment in the remedy sought to just rescission. And, in light of the enormous increase in the trading volume of Enron's securities that occurred surrounding the revelation of the Enron fraud during the second half of 2001 as well as the amount of time that elapsed in the five years between the initial public offering of the Preferred Stock, it is doubtful that many of the original purchasers of the Preferred Stock still hold their shares and thereby entitled to the limited remedy that Wolf Haldenstein is now apparently seeking. Combined, these factors substantially reduce any recovery that the 1996-97 Preferred Purchasers could otherwise maintain.

B. The Defendants May Persuasively Argue That the 1996-97 Preferred Purchasers' Claims Are Likely Time Barred With Respect to Many Defendants

Wolf Haldenstein seeks to name a plethora of defendants, and presumably would justify doing so because several complaints were filed prior to the running of the five year statute of repose. *See* Additional Memorandum at 5 n.3 ("[T]here is no statute of limitations issue.... [T]he original complaint by the Preferred Purchaser Plaintiffs was filed on approximately October 30, 2001, less than five years after both preferred stock offerings."). Rule 15 does not appear to countenance the view taken by Wolf Haldenstein. *See Schiavone v. Fortune*, 477 U.S. 21, 29 (1986) ("Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period."). Even a cursory review of such complaints shows that only a few defendants appear to have been named in those complaints. Thus, any Lead Plaintiffs/Lead Counsel's efforts to prosecute these claims would also be severely burdened by defendants' arguments that claims of

the 1996-97 Preferred Purchasers who purchased in the January 13, 1997 offering would be limited to these defendants.

In this regard, both of the complaints filed by Wolf Haldenstein appear deficient. As detailed above, the Original *Steiner* Complaint included a class period starting in 1999. The First Amended *Steiner* Complaint is also deficient. ***First***, it contained a class period starting January 21, 1997 – but the initial offering of Enron Capital Trust II stock occurred on January 13, 1997. The January 21st date is not a typographical error and was not arbitrarily chosen; it is the date that Enron released its 1996 results. However, the stock was issued prior to the date the 1996 financials were announced and the First Amended *Steiner* Complaint does not detail any allegation concerning the falsehood of prior announcements, nor does it allege any misstatement in the offering documents. Indeed, the First Amended *Steiner* Complaint does not allege any falsehood as to the 1995 financial statements incorporated by reference into the offering documents. As shown above, it will be difficult to overcome defendants' argument that the class period in the First Amended *Steiner* Complaint cannot be amended back now (or if it could have been amended at anytime after the statute of repose ran on January 13, 2002) to include the offering date. ***Second***, the only named defendants in the First Amended *Steiner* Complaint were Enron, Lay, Skilling, Fastow, and Andersen. Even if the First Amended *Steiner* Complaint put any of these defendants on notice of claims in connection with the January 13, 1997 offering, defendants will most assuredly argue that no other defendant was put on notice by this complaint.

Plaintiff Coy filed a timely Petition (amended twice already), with a class period beginning on January 1, 1997. The Petition names as defendants Andersen, Duncan, Goddard, Niemann, Swanson, Swick and Elsenbrook. Like the First Amended *Steiner* Complaint, it would be very difficult to argue that the *Coy* Petition put the defendants on notice of the claims alleged in the supplement proposed by the 1996-97 Preferred Purchasers. For example, the *Coy* Petition does not: (i) assert a claim under the TSA; (ii) assert a claim on behalf of purchasers of the Preferred Stock (rather it claims to represent "shareholders"); and (iii) does not allege any wrongdoing in connection with the offering of the Preferred Stock. *See, e.g., Coy* Plaintiffs' Second Amended Petition, ¶11 ("Beginning in 1997, Andersen, as aiders and abettors, participated in Enron's planning, organization,

and accounting practices for, among others, LJM2, LJM-C, and Chewco.") (Ex. 5 hereto). And, obviously the January 13, 1997 offering documents could not have been false because of the actions Andersen took in falsifying the 1997 financial statements – which were issued over a year after the offering. Therefore, attempting to convince this Court that the *Coy* Petition put defendants on notice of claims arising out of the January 13, 1997 offering would be extremely difficult, at best.

VI. WOLF HALDENSTEIN HAS BROUGHT IN NEW CLIENTS AND REPEATEDLY ALTERED THE CLAIMS IT ASSERTS

The theories espoused in the Additional Memorandum represent the latest round of Wolf Haldenstein's attempts to concoct a cognizable claim so that Wolf Haldenstein can interject itself into these proceedings. The Additional Memorandum contains unwarranted attacks on the professional integrity of Lead Counsel and is a world apart from any previous filing or subsequent proposal drafted on behalf of the 1996-97 Preferred Purchasers. ***First***, Wolf Haldenstein filed complaints focused on ***federal securities claims*** for purchasers in the aftermarket for damages without mention of the TSA. Then, Wolf Haldenstein sought only one remedy pursuant to state law, a claim for negligent misrepresentation, telling this Court that "this claim should have been asserted. Milberg Weiss simply omitted this claim from their consolidated complaint." Additional Memorandum at 7. Wolf Haldenstein now properly admits it was in error concerning the negligent misrepresentations. Thereafter, Wolf Haldenstein filed the Additional Memorandum seeking damages under the TSA and negligent misrepresentation. *See id.* at 8,10. These allegations are unsubstantiated, incorrect, and belied by the fact that Wolf Haldenstein has since conceded that Milberg Weiss was indeed correct in not asserting damage claims for negligent misrepresentation.[10] Recognizing their original plaintiff's infirmities, Wolf Haldenstein now seeks to augment its position

[10]Indeed, the only complaints Wolf Haldenstein has filed on behalf of the 1996-97 Preferred Purchasers were defective as to the sole plaintiff bringing the action, Henry H. Steiner. The First Amended *Steiner* Complaint sought remedies under the federal securities laws and negligent misrepresentation – even though Mr. Steiner purchased his shares in July 1997 beyond the three-year statute of repose clearly defined for federal securities claims. *See* §II above. Steiner's negligent misrepresentation claim, as detailed above, is highly dubious at best. Thus, Wolf Haldenstein may have never asserted any legally cognizable claim on behalf of Mr. Steiner. It is not entirely clear why Mr. Steiner's counsel, Wolf Haldenstein, asserted such claims, but it is clear that they ought not seek to remedy their prior pleading deficiencies by casting blame where none is due.

by introducing new plaintiffs,[11] persons who purchased in the offerings and might possibly be able to bring a claim under the TSA. Wolf Haldenstein's repeated attempts to alter their purported claims raises serious issues as to whose interests this exercise is designed to advance and protect.

VII. LEAD PLAINTIFF PROPOSES A WORKABLE SOLUTION TO SAFEGUARD THE INTERESTS OF PERSONS WITH VIABLE CLAIMS

Realizing the responsibility it has undertaken with respect to the Class in connections with its appointment as Lead Plaintiff, Lead Plaintiff chooses not to add the proposed supplement to the Consolidated Complaint. Lead Plaintiff is committed to preparing for trial the case as detailed in the Consolidated Complaint. With respect to the claims of the 1996-97 Preferred Purchasers, Lead Counsel and Lead Plaintiff believe that a valid claim, if one exists, should be prosecuted by the 1996-97 Preferred Purchasers utilizing their own counsel.

VIII. CONCLUSION

The Court should deny the motion by Wolf Haldenstein seeking to supplement the Consolidated Complaint.

DATED: July 5, 2002

Respectfully submitted,

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[11] According to the June 20, 2002 draft supplement provided to Lead Counsel by Wolf Haldenstein, the new proposed plaintiffs are: (i) Esther Phillips Jackson, who purchased 1,200 shares of Enron Capital Trust II at $25.00; and (ii) Michael G. Palmiero, who purchased 200 shares of Enron Capital Trust I at $25.00.

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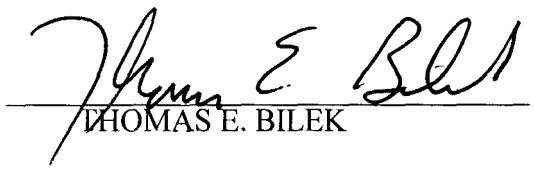

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DECLARATION OF SERVICE BY E-MAIL, FACSIMILE OR UPS

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on July 5, 2002, declarant served the foregoing document by sending via e-mail, facsimile or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of July at San Diego, California.

Mo Maloney

Mo Maloney

The Service List

Attached

to this document

may be viewed at

the

Clerk's Office

The Exhibit(s) May

Be Viewed in the

Office of the Clerk